



REPUBLIC OF SOUTH AFRICA

26/98
Case No 696/94

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

In the matter of:

**BOARDMAN BROTHERS (NATAL) (PTY)
LIMITED**

Appellant

and

CHEMICAL INDUSTRIAL WORKERS' UNION

Respondent

CORAM: Smalberger, Harms, Streicher JJA, Melunsky et Farlam
AJJA.

DATE OF HEARING : 13 March 1998

DATE OF DELIVERY: 26 March 1998

J U D G M E N T

/SMALBERGER JA:...

SMALBERGER JA:

The appellant is a manufacturing company. On 30 June 1991 it dismissed twelve of its employees at its Ladysmith factory. The persons dismissed were all members of the respondent. The respondent contended that their dismissals amounted to an unfair labour practice. It sought a determination in terms of the Labour Relations Act 28 of 1956 ("the Act") to that effect, coupled with an order for their reinstatement.

The Industrial Court hearing the matter came to the conclusion that the dismissals had not been unfair. The respondent appealed to the Labour Appeal Court ("the LAC"). The LAC, by a majority decision, allowed the appeal, declared the dismissals to constitute an unfair labour practice and ordered the reinstatement of the dismissed employees. It subsequently granted leave to appeal to this Court.

In briefly recounting the circumstances giving rise to the dismissals I shall borrow freely from the majority judgment of the LAC.

The dismissed employees ("the employees") were engaged in the candle-making section of the appellant's manufacturing operation. Candles were produced twenty-four hours per day. The machines used for their production were operated by two teams functioning as a day and night shift respectively and alternating weekly. At the time relevant to the present appeal (13 to 17 May 1991) the employees were working the night shift. Their working hours were 16:45 to just before 7:00, four times per week (Mondays to Thursdays). Included in these hours were two so-called "lunch breaks" of one hour each, and two short "tea breaks", giving a total working time of eleven and a half hours per night. These hours had been negotiated between workers and management in 1986. The workers had previously been obliged to work five nights per week for periods totalling nine hours per night. Because of transport problems, and because they did not wish to work on Friday nights, workers requested a four night working week for the night shift with working

hours as set out above. Management agreed to this. Neither side was aware of the fact that these extended hours offended against certain provisions of the Basic Conditions of Employment Act 3 of 1983, particularly as they required the employees to work longer hours than that Act permits.

During the period 13 to 17 May 1991 the appellant caused the employees' work performance to be monitored by means of video equipment installed without their knowledge. The reason for resorting to such a step was management's concern about falling production levels and the employees' chronic inability to achieve the production targets they had been set. Both the day and night shifts were required to meet specified targets. Because of the consistent failure to meet these management was seriously considering retrenchment of all but six of the workers on the two shifts.

The video recordings revealed that on the night of 13-14

May 1991 the employees worked between 8 - 8½ hours each; on the night of 15-16 May 1991 they worked for 7½-8 hours. On both nights all the employees stopped working at various intervals between 02:00 and 02:30 whereupon they went to sleep in the change rooms. They arose at approximately 06:10, showered, changed and clocked out. It is common cause that these were not isolated incidents but had been the usual practice of the employees from the time they had started working on the night shift. Mr Els, the appellant's managing director, calculated that by deducting the number of machine hours actually worked from the machine hours available to the employees during the week in question, 55½ production hours were lost.

It appears from the evidence that a scheme was devised by the employees' shift whereby the workers when on the night shift would forego all but one of their breaks, work straight through until they had achieved their target and then sleep for the rest of the night. This worked

well and they were initially able to achieve their target and then sleep for the rest of the night. Things changed when a compulsory drying process time was introduced. From then on the workers were no longer able to achieve their target within the shortened working hours. This did not prevent them from continuing with what by then was an established practice even though they were thereafter consistently incapable of achieving their production target by a not unsubstantial margin. It is not apparent from the record when each of the employees joined this shift. It would seem that some were already working that shift when the change came about, whereas others joined after the change and simply fell in line with the practice that had developed.

Certain further matters need to be mentioned by way of background. The night shifts operated without supervision. The workers originally requested a supervisor. One was appointed, but his services were dispensed with after he was found sleeping on duty. He was not

replaced. According to Els, the other team was also monitored when working the night shift but its members were not found to have slept during working hours. Despite this their production levels were consistently lower than those of the (dismissed) employees when doing the equivalent shift. The latter also did better than the other team on their respective day shifts. It also appears, somewhat ironically, that night shift productivity was generally higher than that of the supervised day shift. In January 1991 there were negotiations with regard to the working hours of the night shift. Management proposed that the night shift should revert to five nine-hour shifts per week. This was declined on behalf of the workers who in turn proposed that the night shift be reduced from 18:00 to 06:00 with fewer and shorter breaks. This counter-proposal was still under consideration by management when the relevant events occurred.

Because of what was revealed by the video recordings the

employees were suspended and each one was charged at a disciplinary enquiry with:

- “1. Being absent from your work station without permission during night shift with specific reference to week 13 to 17 May 1991.
2. Sleeping on duty while on night shift with specific reference to week 13 to 17 May 1991.
3. Breaching your contract with the company through the conduct referred to in 1 and 2 above and dishonesty in claiming payment from the company for time not worked with specific reference to week 13 to 17 May 1991.”

An independent labour consultant was engaged by the appellant to preside over the enquiry. He found that the employees were guilty of the charges and recommended their dismissal. The appellant, acting on the recommendation, duly dismissed the employees. Their internal appeal against the finding and their resultant dismissals was unsuccessful.

It is clear from the record that the reason why the employees

were dismissed was because of the finding that they had been dishonest.

According to the appellant's disciplinary code, being absent from a work station and sleeping while on duty are not offences punishable with dismissal on the first occasion. It was conceded on behalf of the appellant that but for the finding of dishonesty dismissal would not have been an appropriate sanction.

Although the employees were charged with dishonestly claiming payment from the appellant for time not worked, this was an incorrect formulation of the complaint. The real thrust of the appellant's case was that the employees had dishonestly taken money for work not done. Nothing turns on this difference. All the relevant facts were canvassed before the Industrial Court and the nature of the employees' alleged dishonesty is ultimately a matter of inference from those facts.

The majority of the LAC held that "[i]n our view, the workers did not dishonestly set out to claim money for time not worked -

they believed that if they achieved their target they were entitled to sleep”.

In terms of sec 17 C(1)(a) of the Act this Court is bound by the factual findings of the LAC. Mr Wallis, for the appellant, contended that the passage quoted did not amount to a factual finding that the employees had never acted dishonestly, but only that they had not done so initially. Mr Wallis accepted that the workers had not acted dishonestly at the outset, nor over the period that they were able to maintain their production target, since they did the work expected of them and for which they were being paid. The situation changed, however, once they knew that they were no longer achieving their target yet still persisted in knocking off early and going to sleep. Despite knowing that they were not achieving their target or working the hours expected of them they continued to accept payment for work not done without revealing to management what the true state of affairs was. This, Mr Wallis contended, constituted dishonesty on their part.

I do not propose to analyse the LAC judgment with a view to ascertaining precisely what the quoted passage, which in the context of the judgment is somewhat ambiguous, was intended to convey. I am prepared to assume, for the purposes of the appeal, that the construction placed upon it by Mr Wallis is correct, and that the evidence establishes that they were dishonest from the time and in the manner contended for.

I shall also assume that in those circumstances dismissal was permissible.

What remains to be considered is whether their dismissal, in all the circumstances, was unfair. A lawful dismissal will not for that reason alone be fair. In judging fairness or unfairness a court must ultimately apply a moral or value judgment to the established facts and circumstances of the matter under consideration (see *National Union of Mineworkers and Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie Mine* 1996 (1) SA 422 (A) at 446 F-G, 446 I).

In determining the issue of unfairness the following considerations must be taken into account:

(1) When the employees initially joined the scheme that had been devised to enable them to reach their target and then go to sleep it was not their intention to prejudice the appellant or act dishonestly. They were able to achieve what was expected of them. Els made it clear in evidence that he would have had no objection to the employees going to sleep after they had achieved their target. From the point of view of a relatively unsophisticated and probably poorly educated workforce they were, to put it colloquially, "doing their job".

(2) When the change in the drying process was introduced it was no longer possible for the employees to reach their target by following the course they had up to then. But it was already an established practice and part of their working routine. They simply carried on as before — old habits die hard, and even the threat of possible retrenchment did not

cause them to reconsider. They were wrong to have done so and not at least to have adjusted their times to achieve their target. People of a higher level of sophistication and understanding would probably have realised the need to do so more readily and have responded appropriately. The fact that the employees did not must not be judged too harshly.

(3) The employees were required to work longer hours than permitted by law. The LAC (the majority) held that "there was clear evidence that they were finding the hours physically too demanding". It may well be that the illegality *per se* was not causally related to their failure to work because they in any event did not work the hours permitted by law. But that does not detract from the fact that they were faced each day with a working period with which they could not cope physically. Although management acted with the best of intentions and in what it no doubt conceived to be the workers' interests in acceding to their request to work only four nights a week, it should have realised, as a reasonable

employer, that the workers could not and would not be able to work the hours agreed upon, and should have foreseen their sleeping during working hours as a real possibility. Yet the employees were permitted to continue unsupervised. That the long hours probably did have a negative impact upon performance is borne out by the fact that the other team, despite working the full period, was not able to match the employees' production levels.

(4) The employees would probably have been alive to the fact that they were consistently outperforming the other team both in respect of night and day shifts. This could have induced the (false) belief that as they were doing as well as (and indeed better than) the others they could not realistically be expected to do more, despite regular complaints that they were not achieving the required production levels.

(5) The problems relating to the long working hours were the subject of negotiations which had not yet been finalized as a response was

still awaited from management to the workers' proposal.

(6) It would appear that the employees were all of fairly long standing. There is no evidence that they had previously been guilty of any, or any serious, disciplinary breaches. No warnings had been given, or corrective disciplinary measures taken, before deciding to dismiss them.

(7) The employees were clearly at fault in not telling management that they were physically unable to work the long hours; not disclosing the fact that they were sleeping and the extent to which they were not working; accepting, over a long period of time, payment for hours not worked; and ignoring management's legitimate concerns about low and declining production levels.

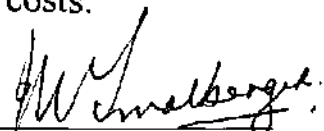
The majority of the LAC came to the following conclusion:

"In our judgment some form of corrective discipline should in the circumstances have been applied instead of the drastic measure of dismissal. Although the sleeping was not in

response to the illegality, it still offends against one's sense of fairness that workers are dismissed for sleeping during hours of work which the law prohibits. In addition, despite it being their choice, they were physically not able to work those hours."

This finding goes to the heart of the matter. I agree that on a conspectus of all the relevant circumstances dismissal was not an appropriate sanction. The employees' dishonesty was not such as would inevitably call for their dismissal; there were mitigating factors present and the working relationship between the parties did not suffer irreparable damage as a consequence of the employees' conduct. In arriving at this conclusion I feel the same sympathy for the appellant as expressed by the LAC, bearing in mind that the appellant did its best to act fairly and correctly throughout.

In the result the dismissal of the employees amounted to an unfair labour practice. The appeal is dismissed with costs.


J W SMALBERGER

HARMS, JA)
STREICHER, JA)
MELUNSKY, AJA)
FARLAM, AJA)

CONCUR